

***United States Court of Appeals
for the Second Circuit***



**INTERVENOR'S
BRIEF**

1-47-83 ORIGINAL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 77-4183
77-4184
77-4191

WESTERN UNION INTERNATIONAL, INC.,
RCA GLOBAL COMMUNICATIONS, INC., and
ITT WORLD COMMUNICATIONS INC.,

Petitioners,

-against-

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents,

AMERICAN TELEPHONE AND TELEGRAPH COMPANY
and TRT TELECOMMUNICATIONS CORPORATION,

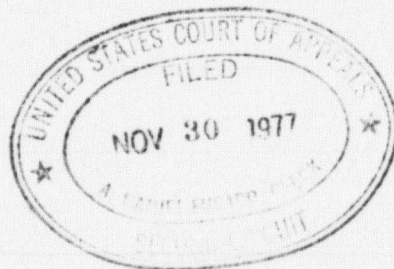
Intervenors.

On Petition for Review of
Decision and Order of the
Federal Communications Commission

BRIEF OF INTERVENOR
AMERICAN TELEPHONE AND TELEGRAPH COMPANY

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AMERICAN TELEPHONE AND TELEGRAPH COMPANY ("AT&T"),
Intervenor in these consolidated cases, submits this brief
in its status as Intervenor.

STATEMENT OF THE CASE

This is a proceeding brought by three International Record Carriers ("IRCs") to review and set aside the Memorandum Opinion and Order of the Federal Communications Commission ("Commission") released October 25, 1977 ("Order") (JA 691) and the Final Decision and Order of the Commission released March 23, 1977 ("Decision"). (JA 157) The Order denied IRC petitions for reconsideration by the Commission of the Decision. The Decision directed AT&T to eliminate unjustified discrimination in rates. (JA 161-65) In compliance with that direction, AT&T filed certain tariff schedules with the Commission and terminated certain contracts pursuant to written notice given under a provision of the contracts. (JA 293-95) At the Court's request, the effectiveness of the tariff schedules is being held in abeyance and facilities are being provided to the IRCs at rates and on conditions equal to those of the terminated contracts.

COUNTERSTATEMENT OF FACTS

This counterstatement includes additional record facts beyond those related to the Argument contained in this brief and is offered to facilitate an understanding of the issues in this case.

The petitions for review involve a dispute over the rates to be charged by AT&T for communications facilities furnished to the IRCs which are used by the IRCs to provide international and overseas communications services to their customers. Rates for such facilities, as well as the terms and conditions under which they were furnished, had been set forth in written agreements between AT&T and each of the IRCs, each commonly referred to as a "General Lease Agreement".

(JA 001)* The General Lease Agreement provided for two types of facilities: (i) Entrance Facilities (facilities connecting a cable head or satellite earth station and the IRC's operating center located in one of the five gateway cities) and (ii) Inter-Operating Center Facilities (facilities connecting the IRC's operating centers in the five gateway cities with each other, e.g., a facility between WUI's New York City and San Francisco offices). Each General Lease Agreement, by its terms, was terminable by either party upon ninety (90) days' written notice to the other. (JA 011, para. 12) Such notice was given by AT&T to each IRC on May 27, 1977. (JA 634) At the same time tariff schedules were filed with the Commission which, along with already effective tariffs, would offer

* The agreements between AT&T, RCA Global Communications, Inc. ("RCA Globcom"), ITT World Communications Inc. ("ITT Worldcom") and Western Union International Inc. ("WUI") were dated April 23, May 3 and May 9, 1968 respectively. Only one agreement is included in the Joint Appendix. All of these agreements were effective as of September 1, 1967, and all were executed before the first record assertion by any IRC of a claim to Indefeasible Right of User in AT&T's landline telecommunications network. (See JA 021)

facilities to the IRCs essentially no different than those offered in the General Lease Agreement but at rates which overall would be higher than those in the General Lease Agreement. (JA 291-95, 530, para. 10, 672-73, 688)

The Decision and Order were issued in a proceeding (FCC Docket No. 20452) commenced on May 7, 1975 which emanated from an earlier Commission proceeding (FCC Docket 20099). That earlier proceeding, in which the IRCs participated fully, involved consideration of the rates, terms and conditions under which AT&T provided communications facilities to various communications common carriers including IRCs, Specialized Common Carriers ("SCCs") and Domestic Satellite Common Carriers ("DSCCs"), all of whom have come to be called "Other Common Carriers" or "OCCs". Before trial of the issues in Docket 20099, all of the parties in that proceeding, including the IRCs and the Staff of the Commission, negotiated a comprehensive settlement of their disputes which the Commission accepted as a disposition of the issues in that proceeding without prejudice.* (JA 059) The Commission said:

"We believe that the terms of the settlement, including the responsibilities undertaken by the parties, are in the public interest because they expedite and further the implementation of established Commission policy." (JA 054, para. 13)

* The negotiations which began on October 3, 1974 "... continued almost daily for just over five months." (JA 054)

Petitioners were among the parties who executed a written agreement ("Settlement Agreement") in Docket No. 20099 which set forth the terms of the agreed-upon settlement. (JA 060, 525-28, paras. 4-7) The Settlement Agreement provided, inter alia, for the furnishing of facilities at specified tariff rates which have been applied since then to all SCCs and DSCCs. IRCs have continued to be charged at the General Lease Agreement rates in view of the pendency of FCC Docket 20452 which was commenced at the same time that Docket 20099 was terminated.* (JA 158, para. 3)

The tariff schedules filed pursuant to the Settlement Agreement provided in many cases for substantial discounts from previous tariff rates.** However, even those discounted

* The Commission noted, "The Settlement Agreement points out, however, that, notwithstanding the furnishing of similar facilities to other common carriers pursuant to tariffs, entrance and intercity facilities furnished by AT&T to the IRCs continue to be furnished pursuant to contract." (JA 057, para. 23) The Settlement Agreement recited the parties' recognition of the "unique needs" of the IRCs for certain facilities. At a meeting held at the request of RCA Globcom (JA 640, 645), a representative of a domestic OCC who was present during the negotiations leading to the Settlement Agreement indicated that the "unique needs" language was included in the Settlement Agreement at the insistence of the IRCs. (See JA 656)

** The agreement provided for a 30% reduction from rates effective August 2, 1974 for intraexchange voice grade and wire pair facilities and a 21% reduction from the August 2, 1974 rates for interexchange voice grade facilities within a 40 mile radius (within a state) from a rate center. (JA 056, para. 20) The intraexchange voice grade and wire pair facilities are those which are provided, inter alia, to the IRCs pursuant to Appendix C of the Settlement Agreement.

rates were higher than rates charged under the General Lease Agreement which themselves are now almost 10 years old. The discounted rates, as well as other rates set forth in tariff schedules filed pursuant to the Settlement Agreement, are the rates which AT&T's compliance with the Decision and Order visits upon the IRCs. The Settlement Agreement did not contemplate, nor did the Commission require in accepting the agreement, the submission of any cost or other supporting material or data. The rates, as well as the other parts of the Settlement Agreement, were the product of the negotiations.*

In accepting the Settlement Agreement (JA 49), the Commission noted that one of the issues it had designated for hearing in Docket No. 20099 was the question of whether the provision of facilities to IRCs should continue under contract, i.e., the General Lease Agreement, or pursuant to tariff. It indicated that it would institute a separate proceeding to inquire into this issue. That separate proceeding became Docket No. 20452 (JA 61).

The specific issues designated for investigation by the Commission in Docket 20452 were relatively limited ones: (1) whether facilities furnished by AT&T to IRCs should be

* Under the Settlement Agreement the rates are to remain in effect on an interim basis until AT&T files tariff rates which are to be supported with cost data. The minimum effective period for the interim rates was to be 12 months (with an additional six months' notice after the filing of post interim rates), but no maximum period was established for the effectiveness of the interim tariff rates. (JA 056, para. 21, 060) AT&T presently plans to file such "Post-Interim" tariffs by December 1, 1978. (JA 737)

furnished pursuant to tariff rather than contract and (ii) whether IRCs should be required to furnish private line services directly to customers' premises in gateway cities. The second issue, which was decided in the negative, is not a matter in dispute in this review. The first issue, which was also decided in the negative, is also not directly in dispute in this review. What is in dispute is a basic finding by the Commission that facilities furnished to IRCs and to SCCs and DSCCs are substantially identical and that different rates for such facilities are not justified. This finding was consistent with and was indicated in the Commission's order initiating Docket 20452. In that order the Commission said:

"It appears to us that there is no significant difference between the interconnection facilities provided to the IRCs and those provided under tariff to specialized common carriers including domestic satellite common carriers." (JA 061)

AT&T and each of the IRCs submitted written comments and Reply Comments in Docket No. 20452. AT&T stated that contract arrangements had been satisfactory in the past but that it was prepared to provide facilities under tariffs at appropriate rates if the Commission so determined. (JA 071-73)

In its Decision in Docket No. 20452 (JA 157), the Commission directed AT&T to eliminate different rates charged to Domestic Satellite Carriers ("DSCCs") and Specialized Common Carriers ("SCCs") on the one hand and the IRCs on the

other for what the Commission found to be substantially identical facilities. (JA 163) As the Commission noted in its Memorandum Opinion and Order on reconsideration, the Decision "... did not order AT&T to undertake any particular means to eliminate the unjustified discrimination, but left that choice up to AT&T, e.g., it could expand the list of carriers subject to standard contracts or file appropriate tariffs." (JA 695) AT&T chose to apply the tariff rates set forth in the Settlement Agreement to facilities furnished to IRCs. To that end it filed a new tariff schedule and terminated the General Lease Agreements in accordance with their terms.

Following release of the Decision, representatives of AT&T met on four occasions with members of the Commission's Common Carrier Bureau Staff ("Staff"). Petitioners allege that these four meetings involved prohibited ex parte presentations. On that basis they seek reversal and remand of the Decision and Order. The substance of what occurred at those meetings was the subject of the Staff's letter, dated June 24, 1977, which speaks for itself. (JA 336) However, with respect to those meetings, AT&T submits that two conclusions are justified: (i) no discussion took place with respect to the merits of the Commission's findings in the Decision and (ii) the discussions addressed the subject of actions AT&T was considering by way of complying with the Decision.*

* AT&T's actions, inter alia, were also the subject of an ex parte discussion initiated by one of the IRCs with the Commission Staff (JA 340).

SUMMARY OF ARGUMENT

AT&T does not propose to respond in any detail to all of the arguments raised by Petitioners in their briefs. Those arguments are more appropriately the province of the Commission to rebut. They generally relate to alleged procedural deficiencies surrounding the Commission's actions in Docket No. 20452 and the alleged lack of substantial record evidence to support the Decision which ordered AT&T to eliminate differences in rates. Petitioners have, however, raised one point on which AT&T believes it can and should assist the Court in its consideration, i.e., the allegation that AT&T and members of the Commission Staff engaged in prohibited ex parte contacts and that such contacts require that the Decision and Order be reversed.

AT&T submits that the IRCs' arguments fall short of providing a basis for reversal and remand for the following reasons:

- I. NO PROHIBITED EX PARTE PRESENTATION WAS MADE BY AT&T
 - A. The Subject Of The Discussions Was The Manner In Which AT&T Would Implement The Commission's Decision In Docket No. 20452, Not The Merits Or Outcome Of That Decision.
 - B. Docket No. 20452 Dealt With The General Lease Agreements While The Discussions Dealt With Matters Other Than The General Lease Agreements.
- II. NO PROCEEDING HAD BEEN INSTITUTED WHICH RELATED TO THE SUBJECT OF THE DISCUSSIONS, TARIFF FILINGS AND OTHER ACTIONS TO COMPLY WITH THE DECISION

III. IN ANY EVENT, THE DISCUSSIONS RESULTED IN NO ACTUAL PREJUDICE TO PETITIONERS

- A. The IRCs Were Adequately Informed Of The Substance Of The Discussions And Had The Full And Timely Opportunity To Comment Thereon.
- B. Since The Subject Matter Of The Discussions Did Not Relate To The Merits Or Outcome Of The Decision, No Prejudice Resulted From The Occurrence Of The Discussions.

IV. APPLICABLE JUDICIAL PRECEDENT DOES NOT REQUIRE OR WARRANT REVERSAL AND REMAND ON THE ALLEGED EX PARTE GROUND

POINT I

NO PROHIBITED EX PARTE PRESENTATION
WAS MADE BY AT&T

- A. The Subject Of The Discussions Was The Manner In Which AT&T Would Implement The Commission's Decision In Docket No. 20452, Not The Merits Or Outcome Of That Decision

AT&T's discussions with the Staff were not, in any sense, communications prohibited by the Commission's ex parte rules. Only "presentations," defined as "any communication going to the merits or outcome of any aspect of a restricted proceeding," are prohibited by the ex parte rules.* No discussions took place before the Decision was released. (JA 337) At the four meetings after the release of the Decision, neither the "merits" nor the "outcome" of the proceeding was discussed. Indeed, the assumption underlying the meetings was that the merits and outcome of Docket No. 20452 were finally

* C.F.R. §1.1201(f) (Set forth at A33, Brief of Petitioners Western Union International, Inc. and RCA Global Communications, Inc.)

decided and that AT&T shortly would have to take action and file appropriate documents to comply with it. For example, with respect to the March 24 meeting, the Staff letter states:

"The subject of the meeting was the problems AT&T indicated it was having in filing tariffs revisions, or maintaining contracts in some cases, to implement the Commission's Decision in Docket 20452." (JA 337)

The distinction between discussion of the merits or outcome of the Decision in Docket No. 20452 and discussion of certain aspects of AT&T's compliance with the Decision is dramatically demonstrated by events in the March 31, 1977 meeting. The Permut Letter shows that during that meeting, "AT&T once started to discuss the 'difference' in cost of building IRC entrance facilities vis-a-vis OCC entrance facilities." (JA 338) Discussion on that subject was not permitted by the Commission Staff.* It is obvious that the Commission Staff was very conscious of the ex parte rules. At the first mention of a subject which even arguably could have been regarded as related to the merits of the Decision, the Staff foreclosed discussion of that subject forthwith. The remaining discussions dealt with the details of contracts other than the General Lease Agreements, the applicability of

* The record of the March 31, 1977 Meeting does not indicate if AT&T believed that any cost differences did exist and, if so, the nature of those differences. However, on September 7, 1977, AT&T stated to the IRCs and Commission Staff personnel that AT&T could not cost justify a lower rate for such facilities to the IRCs (JA 656).

the Decision to these other contracts, the tariff filing to be made and the special permissions attending that filing.

B. Docket No. 20452 Dealt With The General Lease Agreements While The Discussions Dealt With Matters Other Than The General Lease Agreements.

A close examination of the Staff letter reveals that the matters discussed at that meeting were not even the subject of Docket No. 20452. (JA 336) The subject matter of Docket 20452 was, from its inception, the General Lease Agreements, and not the more specific agreements by which AT&T provides unique facilities, in some cases to satisfy a specific, non-recurring need of an IRC, but which are not provided to OCCs.

In its Designation Order in Docket 20452, the Commission stated that its concern - and the subject matter of that Docket - was the provision of entrance facilities and interoperating center facilities to the IRCs pursuant to contract. (JA 061) In its Decision (JA 157), the Commission clearly indicated the contracts which were the subject of that proceeding:

" . . . Each of the IRCs has an individual contract with AT&T for these facilities but all contain identical terms . . . The AT&T-IRC contracts were executed in 1968 and outline the terms and conditions of the leasing of the circuits, run from month-to-month, require ninety days' notice for termination by either party and contain an appendant rate schedule for the facilities concerned." (JA 157-158)

If there was any doubt that the General Lease Agreements were the only contracts which were the subject of Docket 20452, the Commission resolved that question on reconsideration:

"... the facilities at issue in Docket No. 20452 were provided under the identical general leasing contracts AT&T has with each IRC. We did not intend to consider the appropriateness of AT&T's other contractual arrangements with individual IRCs, or with the IRCs jointly, in Docket No. 20452. (JA 710) (Emphasis added)

The Commission then indicated its intention to institute a new investigation of those "other" contractual arrangements (JA 709-10), none of which were intended to be involved in Docket 20452. Thus, insofar as the IRCs seek further opportunities for a hearing on those contractual arrangements, they will have them.

It is obvious, therefore, that the subject matter of the four meetings between AT&T and the Staff did not deal with any facilities which were provided pursuant to the General Lease Agreements. Since those facilities were the subject of other contracts, they were beyond the scope of Docket 20452. Thus, any discussion of those other facility contracts could not, by definition, have dealt with the subject matter of Docket No. 20452 and did not constitute ex parte presentations.

POINT II

NO PROCEEDING HAD BEEN INSTITUTED WHICH
RELATED TO THE SUBJECT OF THE DISCUSSIONS,
TARIFF FILINGS AND OTHER ACTIONS TO COMPLY
WITH THE DECISION.

The Commission's Order of May 7, 1975 instituting Docket No. 20452 clearly stated the two specific issues to be investigated. Each of those questions was answered in the negative in the Decision (JA 165). Having decided the basic policy issue it had docketed for investigation, the Commission then directed that rate differences be eliminated, leaving to AT&T the choice of the method of elimination. Docket No. 20452 was complete and the Commission therefore ordered the proceeding terminated. (JA 165, para. 28)

As is evident from the Staff's Letter, dated June 27, 1977, the post-Decision discussions involved specific problems in complying with the Decision, e.g., preparing tariffs. Each discussion occurred prior to filing the tariffs and the termination of the General Lease Agreement and, of course, prior to the subsequent IRC pleadings relating to the tariff filings. Thus, the discussions, which took place between March 24, 1977 and May 18, 1977, occurred prior to the institution of any proceeding addressing the merits of the tariffs which were filed on May 27, 1977. AT&T was interested only in understanding the directions of the Commission in the Decision in order that it could comply with

the Commission's directions, viz., the elimination of discrimination in the future in the provision of similar facilities to IRCs and OCCs. Neither the merits nor the outcome of Docket No. 20452, nor the substantive and procedural issues involved therein, were the subject of the meetings. The Decision was a "given" in the discussions. What was in question was simply compliance with the Decision. In particular, there were questions regarding the applicability of the Decision to those contracts for provision of unique facilities to IRCs where no comparable facilities are provided to OCCs. Such pre-filing discussions between the Staff and the carrier involved are permissible and indeed essential to the effective discharge of the Commission's obligations with respect to complex tariff filings.*

The Commission's ex parte rules are applicable only to "restricted" proceedings. Tariff proceedings are rule-making proceedings which are restricted under the Commission's Rules only from "the day they are instituted."** No proceeding whatever had been instituted regarding the tariff filing which was the subject of the AT&T/Staff discussions.

* In Home Box Office, Inc. v. FCC, No. 75-1280, slip opinion, (D.C. Cir. March 25, 1977) cert. denied, 46 U.S.L.W. 3190 (October 3, 1977), principally relied on by Petitioners in support of their argument on this point, the Court recognized ". . . that informal contacts between agencies and the public are the 'bread and butter' of the process of administration and are completely appropriate so long as they do not frustrate judicial review or raise serious questions of fairness." (Slip Opinion, p. 97) As shown herein, neither of these evils occurred as a result of the four meetings in question.

** FCC Rules and Regulations §1.1207.

AT&T complied with the Decision by filing to bring the rates for facilities furnished to IRCs up to the same level agreed to in the Settlement Agreement, i.e., the level at which charges for facilities furnished to other OCCs were set. Any subsequent proceeding involving that tariff filing would be a new proceeding narrowly focusing on the particulars of the filing itself. Accordingly, the discussions were outside any then pending proceeding and the FCC's ex parte rules were simply not applicable, much less violated.

POINT III

IN ANY EVENT, THE DISCUSSIONS RESULTED IN
NO ACTUAL PREJUDICE TO PETITIONERS

- A. The IRCs Were Adequately Informed of
the Substance Of The Discussions And Had
The Full And Timely Opportunity To Com-
ment Thereon

Petitioners argue that the Commission failed to keep an adequate record of the meetings. (Petitioners' Brief, p. 38) This argument ignores the detailed summary of these meetings (and one contact between a representative of WUI and the Commission Staff) which was provided to all parties on June 24, 1977. (JA 336) Petitioners fail to articulate in what manner the record of these meetings is "inadequate". By contrast, in Home Box Office, discussed infra at Point IV, the record of ex parte contacts prepared for the Court was characterized as imprecise and incomplete with dates of various contacts often uncertain or estimated. (Slip Opinion, p. 85)

The record of the alleged ex parte contacts in the instant case is more than adequate to overcome any claim of prejudice. As the Commission noted in its Memorandum Opinion and Order on reconsideration:

"Ultimately, however, it would seem that any items discussed at these meetings which were not subject to staff recollection can hardly be said to be a factor in influencing the Commission's decision-making process." (JA 722)

The summary of these meetings was prepared by June 24, 1977. The Commission's Memorandum Opinion and Order on reconsideration was not adopted until October 13, 1977. The probability of a staff participant in these meetings remembering, in September or October, a detail of decisional significance about the meetings that he could not remember in June is quite remote.*

Following transmittal of the detailed summary of the four alleged ex parte contacts to the parties in Docket No. 20452, each party was given the opportunity to comment thereon. (JA 340) Only WUI chose to avail itself of this opportunity, and its comments were included in a Petition

* In Action For Children's Television v. F.C.C., No. 74-2006, slip opinion, (D.C. Cir. July 1, 1977), the Court discussed the question of the adequacy of the record of alleged ex parte contacts and observed that the problem is a matter of degree for which an "appropriate line must be drawn somewhere." The ultimate extreme, observed the Court, would be the imposition of a lie detector test "to determine whether the required summary is an accurate and complete one." (Slip Opinion, p. 36) Nothing in the record of this case reasonably suggests the insufficiency of the record of the four meetings in question as to warrant reversal by the Court for prejudice to the IRCs.

to Reject AT&T's tariff (JA 442; See also AT&T's Opposition to that Petition at JA 559)* Thus, any prejudice which might have resulted from the four meetings in question was cured by the opportunity for comment.

B. Since The Subject Matter Of The Discussions Did Not Relate To The Merits Or Outcome Of The Decision, No Prejudice Resulted From The Occurrence of the Discussions

As noted above (Point I), the subject matter of the discussions between AT&T and the Commission Staff dealt with matters other than the General Lease Agreements. Since those agreements - and those alone - were the subject of Docket 20452, any discussions relating to other agreements between AT&T and the IRCs could not have prejudiced the IRCs as to their participation in Docket 20452. Thus, even if a technical violation of the Commission's ex parte rules were found, which we assume only arguendo, no prejudice resulted from such a violation.

POINT IV

APPLICABLE JUDICIAL PRECEDENT DOES NOT REQUIRE OR WARRANT REVERSAL AND REMAND ON THE ALLEGED EX PARTE GROUND

The IRCs' argument is essentially based on two precedents, Home Box Office, Inc. v. F.C.C., supra, and Moss v. C.A.B., 430 F.2d 891 (D.C. Cir. 1970). Each is distinguishable.

* The WUI Petition To Reject argued only that the fact of these meetings was a cause alone for rejection. The Petition did not comment on the substance of the meetings or the reasons - if any - why the facts developed in those meetings warranted reconsideration of the Decision.

Home Box Office involved appeals from the Commission's promulgation of rules affecting the type of programming which could be originated on cable television systems. During the pendency of those proceedings, and before the promulgation of the rules, numerous ex parte contacts between Commissioners, Commission employees, parties to the proceeding and others (members of Congress, the trade press and performing arts groups) occurred. Those ex parte contacts involved discussions ". . . in confidence [of] the merits of the rules under review here" (Slip Opinion, p. 84) and more specifically, presentations by affected broadcasters of ". . . the kind of pay cable regulation that, in their view, broadcasters 'could live with.'" (Id., p. 88) On its own motion, the reviewing Court ordered the Commission to provide a detailed list of all ex parte presentations made during the rulemaking proceeding. The report filed by the Commission in response to this order revealed, "albeit imprecisely" (Id., p. 85), extensive ex parte contacts by virtually all parties and by many non-parties. The Court remanded the case to the Commission with instructions to hold an evidential hearing to determine the nature and source of all ex parte contacts made to the Commission or its employees.

The contrast between the facts in Home Box Office and in the instant case is striking. First and foremost, the four meetings at issue herein did not relate to the merits

of Docket No. 20452 (i.e., the propriety of continuing the General Lease Agreements only for IRCs). Indeed, the Commission indicated that it would institute an investigation into those other facility contracts in the near future. (JA 710) Thus, the subject matter of the four meetings related to action to be taken, tariff filings not then made, and proceedings not then instituted, and indeed, insofar as they related to facilities furnished under arrangements other than the General Lease Agreements, to a proceeding not instituted as of this date.

However, assuming, arguendo, that the four meetings did involve some kind of prohibited ex parte contacts, the instant case is still distinguishable from Home Box Office. As the Court there observed:

"If ex parte contacts nonetheless occur, we think that any written document or a summary of any oral communication must be placed in the public file established for each rulemaking docket immediately after the communication is received so that interested parties may comment thereon."
(Id., p. 98)

Such action was not taken in the Home Box Office case. The first listing of the contacts involved occurred only after a Court order to the Commission to provide such a list to the Court. No opportunity for comment on such listed contacts was given to the public before the Commission entered its final decision in the rulemaking proceeding.

By contrast in the present case, a detailed summary of the four alleged ex parte contacts, as well as a fifth ex parte contact initiated by one of the IRCs, was provided by the Staff to the parties in Docket No. 20452 within five weeks of the date of the last meeting and each party was given the opportunity to comment thereon. (JA 340) As noted above (Point III, A), only one IRC chose to avail itself of this opportunity. Thus, any prejudice which might have resulted from the four meetings in question was cured by the opportunity for comment.

Petitioners' reliance on Moss v. C.A.B., supra, is equally misplaced. In Moss, the Court found that the Civil Aeronautics Board (CAB) had effectively prescribed rates as a result of a proceeding in which, by the CAB's own admission, ex parte meetings with industry representatives had occurred. No opportunity for comment on these contacts was given and the Court thus found the record to be inadequate for judicial review. Here, as noted above, no prohibited ex parte presentations occurred but, even if the four meetings are so considered, the opportunity for comment, exercised by one party and available to all, eliminated any prejudice which might otherwise have resulted from such meetings.*

* In the Order denying the IRCs' petitions for reconsideration, the Commission considered the June 24, 1977 summary of the four meetings in question and all of the other pleadings de novo out of an abundance of caution to the IRCs' claims that they were denied a hearing. (JA 698, fn.8) That action demonstrates that the Commission fully considered the details of the meetings, and the IRCs' comments thereon, thereby insulating them against whatever prejudice they claim as a result of the meetings.

Petitioners' citations to Scenic Hudson Preservation Conference v. F.P.C., 354 F.2d 608 (2d Cir. 1965), cert. denied, 383 U.S. 901 (1966); Rhode Island Consumers Council v. F.P.C., 504 F.2d 203 (D.C. Cir. 1974); and Office of Communications of United Church of Christ v. F.C.C., 425 F.2d 543 (D.C. Cir. 1969) are inapposite. All of those cases deal with the failures of administrative agencies to consider relevant information offered during the hearing process and, in United Church of Christ, with the erroneous imposition of the burden of proof regarding a license renewal applicant's qualifications. Ex parte contacts were not at issue in any of the cases.

CONCLUSION

Neither the facts nor judicial precedent warrant reversal and remand of the Decision and Order on the ex parte ground advanced by the IRCs.

Respectfully submitted,

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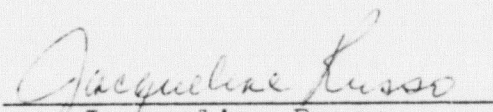
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 30th day of November 1977, three copies of the foregoing Brief of American Telephone and Telegraph Company was personally served by 12:00 noon on the following persons at the addresses indicated below:

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